Supreme Court, U.S.
FILED

991958 JUN 5 - 2000

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No. 99-___

In The

Supreme Court of the United States

YUKON RECOVERY, L.L.C.,

Petitioner,

v.

OCEAN MAR, INC.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where evidence of subrogation is doubtful and insurers failed to undertake timely salvage efforts, should abandonment of historic ship cargoes be inferred, consistent with Congress' manifest intent in the Abandoned Shipwreck Act (ASA), 43 U.S.C. §§ 2101-06, to convey title over such wrecks to the States?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption.

In the District Court, this matter was a consolidated action in which Yukon Recovery L.L.C. brought an *in rem* admiralty action against Certain Abandoned Property, and Ocean Mar, Inc. brought an action styled against the cargo of the SS ISLANDER. The *in rem* defendants below were not otherwise represented.

RULE 29.6 LIST

Yukon Recovery, L.L.C. has no parent companies or subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Yukon Recovery L.L.C., respectfully prays that a writ of certiorari issue to review the March 7, 2000, judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of March 7, 2000, *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, No. 98-36015 (9th Cir. March 7, 2000), is reported at 205 F.3d 1189 (9th Cir. 2000) and is reprinted at App. 1a.

The judgment and order of the U.S. District Court for the District of Alaska, Chief Judge Holland, presiding, of August 28, 1998, was unreported, other than at 1998 A.M.C. ["American Maritime Cases"] 2884 (D. Alaska 1998) and 1998 WL 965985 (D. Alaska). It is reprinted at App. 15a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of March 7, 2000. The Supreme Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This Petition implicates the power of the federal courts to make substantive maritime law, pursuant to the Constitution's grant of jurisdiction in Article III, section 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.").

More immediately, this Petition involves construction of the Abandoned Shipwreck Act (ASA) of 1987, 43 U.S.C. §§ 2101-2106, reprinted in its entirety at App. 31a. The crucial provisions of the ASA include its notional definition of abandonment at section 2101(b), extending the coverage of the Act to "certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention." In addition, 43 U.S.C. §§ 2105(a) & (c) transfer to the States ownership of "abandoned shipwrecks" which satisfy other criterion.

STATEMENT

This Petition raises the question left open by this Court's decision in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) — the standard of abandonment for vessels sunk in State waters and otherwise covered by the 1987 Abandoned Shipwreck Act.

1. a. In 1987, Congress legislated the Abandoned Shipwreck Act (ASA), codified at 43 U.S.C. §§ 2101-2106;

App. 31a. The ASA gave States title to shipwrecks that are (1) abandoned, and (2) are (a) embedded in the submerged lands of a State or (b) declared eligible for listing on the National Registry of Historic Places. See 43 U.S.C. §§ 2105(a) & (c); App. 34a-35a. The manifest purpose of the ASA was to grant to the States title and management authority over historic shipwreck resources. See 43 U.S.C. § 2101(a); App. 31a.

Although the ASA does not formally define "abandonment," it recognizes that abandonment can be inferred for "certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention." 43 U.S.C. § 2101(b); App. 31a. In the legislative history of the ASA, Congress observed that "the term 'abandoned' does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck." *Abandoned Shipwreck Act of 1987*, House Report No. 100-514(I), at 2, reprinted in 1988 U.S.C.C.A.N. at 366. Moreover, Congress noted that

> Abandoned shipwrecks within the scope of this Act include those which have been deserted and to which the owner has relinquished all ownership rights. . . . the act of abandonment may be implied or inferred from the circumstances of the shipwreck as when an owner has never asserted any control over or otherwise indicated a claim of possession.

House Report No. 100-514(II), at 5, reprinted in 1988 U.S.C.C.A.N. at 373-74.

b. Since its enactment, recurring doubts have been raised by courts as to the proper standard of abandonment to be applied to vessels and cargoes ostensibly covered by the ASA. Whether a vessel is abandoned is crucial to the application of the ASA. That finding determines title over the wreck (and its contents), as well as the application of State regulatory authority to protect valuable underwater cultural heritage. If a shipwreck is found *not* to be abandoned for purposes of the ASA, ownership rests in the original owner or a subsequent finder, and effective management of the wreck-site is vested in a salvor-in-possession. The standard of abandonment for shipwrecks, as well as the practical burdens of proof in satisfaction of that standard, has thus become the fighting issue in all litigation involving historic shipwrecks situated on State submerged lands.[1]

[1] Nearly a dozen decisions have involved a substantial question of the standard of abandonment under the ASA. These include: *Deep Sea Research, Inc. v. The Brother Jonathan*, 883 F. Supp. 1343 (N.D. Cal. 1995), aff'd, 102 F.3d 379 (9th Cir. 1996), aff'd in part, vacated in part on other grounds, and remanded, 523 U.S. 491 (1998); *Fairport International Exploration, Inc v. The Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997), vacated and remanded on other grounds, 523 U.S. 1091 (1998), on remand, 177 F.3d 491 (6th Cir. 1999), on remand, 72 F. Supp.2d 795 (W.D. Mich. 1999); *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp.2d 678 (E.D. Va. 1999); *The People ex rel. Illinois Historic Preservation Agency v. Zych*, 687 N.E.2d 141 (Ill. App. 1997), rev'd, 710 N.E.2d 820 (Ill. 1999); *Commonwealth v. Marine Underwater Surveys, Inc.*, 531 N.E.2d 549 (Mass. 1988).

This list does not include (1) cases decided before the enactment

(continued...)

c. In its 1998 opinion in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), this Court had the opportunity to address the ASA's standard of abandonment. The unanimous Court, O'Connor, J., writing, characterized the issue in these terms:

> As to the specifics of the State's claim under the ASA, the [Court of Appeals] held that the District Court did not err in concluding that the State failed to prove that the Brother Jonathan is abandoned within the meaning of the statute. The court reasoned that, in the absence of a definition of abandonment in the ASA, "Congress presumably intended that courts apply the definition of abandonment that has evolved under maritime law." [102 F.3d at 387.] In maritime law, the court explained, abandonment occurs either when title to a vessel has been affirmatively renounced or when circumstances give rise to an inference of abandonment. Here, the Court of Appeals concluded, the District Court's "failure to infer abandonment from the evidence presented by

[1](...continued)
of the ASA but which involved proof of abandonment, see, e.g., *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified Wreck*, 833 F.2d 1059 (1st Cir. 1987); nor (2) decisions involving vessels sunk beyond State waters (and thus beyond the ASA's ambit) where the standard of abandonment was material in a dispute between a finder and an original owner (or its insurer). See, e.g., *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993), subsequent proceeding, 203 F.3d 291 (4th Cir. 2000).

> the State was not clearly erroneous," given the insurance companies' claims to the ship's insured cargo and undisputed evidence presented by DSR that the technology required to salvage the Brother Jonathan has been developed only recently. Id., at 388.

523 U.S. at 499. The appropriate standard of abandonment under the ASA was fully briefed by the parties in *Deep Sea Research*, and a position was even staked-out by the United States as *amicus curiae*. See 1997 WL 473386, at *39-46.

Nevertheless, in *Deep Sea Research*, this Court chose not to fully confront the question of the ASA's standard of abandonment, preferring to confine its decision largely to rejecting California's assertion of Eleventh Amendment immunity in an *in rem* admiralty action where it was not in actual possession of the *res*. See 523 U.S. at 507-08. The Court did, however, make this important observation:

> Because the record before this Court is limited to the preliminary issues before the District Court, we decline to resolve whether the Brother Jonathan is abandoned within the meaning of the ASA. We leave that issue for reconsideration on remand, with the clarification that the meaning of "abandoned" under the ASA conforms with its meaning under admiralty law.

Id. at 508. So aside from confirming that the ASA's standard of abandonment is governed by the federal general maritime

law, this Court reserved decision on the precise contours of that standard. This Petition raises that question.

2. a. This case features two rival salvors for the wreck of the SS ISLANDER, a Yukon Gold Rush-era vessel sunk off the coast of Alaska in 1901. How the SS ISLANDER came to grief in the Lynn Canal, south of Juneau, Alaska, on August 15, 1901, has been sketched by the District Court, see App. 19a, and need not be recounted here for purposes of this Petition. As was observed by the Court of Appeals, App. 2a, most of the relevant facts of this case are undisputed. The SS ISLANDER lies within Alaska's State waters and is thus covered under the 1987 Abandoned Shipwreck Act. See App. 10a-12a; see also 43 U.S.C. §§ 2105 (a) & (c), App. 35a-36a.

The only matter in dispute is whether gold carried as cargo on-board the SS ISLANDER was abandoned by its original owner, the Canadian Bank of Commerce (CBC), and its insurer, the Marine Insurance Company (MIC). If the cargo was not abandoned by CBC and MIC, Ocean Mar becomes the appropriate salvor-in-possession by virtue of its salvage contract with MIC. If the cargo *was* abandoned, the State of Alaska is the owner, pursuant to the ASA, and Yukon Recovery may occupy a superior position to Ocean Mar, Inc., as being the first salvor to file an *in rem* admiralty arrest on The ISLANDER wreck-site.[2]

[2] This Petition would not require the Court to determine whether Yukon or Ocean Mar is the rightful salvor-in-possession of The SS ISLANDER. Both the District Court and Ninth Circuit clearly premised their decisions on a ruling that Ocean Mar had acquired a valid salvage claim from MIC. See App. 9a ("The premise of Yukon's first argument

(continued...)

b. Yukon Recovery, L.L.C. ("Yukon") has proceeded under the assumption that The ISLANDER was abandoned by its hull and cargo owners. To this end, and pursuant to the 1987 ASA, Yukon began survey operations, initiated an *in rem* admiralty arrest in the federal District Court, and secured (by stipulation) permission from the State of Alaska to explore and recover the wreck. The other salvor, Ocean Mar, Inc., chose, instead, to attempt to identify a putative owner for gold allegedly on board the vessel.

As was acknowledged by the District Court, see App. 20a, the record is devoid of any documentary evidence that gold cargo onboard The SS ISLANDER was insured, and that such an insurance claim ripened into a claim of title by subrogation. Ocean Mar nonetheless persuaded the courts below that gold cargo on board The ISLANDER was not abandoned, and that Ocean Mar, by virtue of its salvage contract with the insurer, was the proper salvor-in-possession of the wreck site. This Petition thus questions whether the Ninth Circuit erred in holding (a) that the Marine Insurance Company ("MIC") validly

[2](...continued)
is untenable because the district court's finding regarding abandonment is undisturbed on appeal"); 27a ("The court concludes that the arrest of light fixture does not, in and of itself, afford Yukon Recovery any legal status which is entitled to preference or legal priority over a contract salvor of cargo such as Ocean Mar."); 28a ("The court concludes as a matter of law that a contract salvor should be preferred over one such as Yukon Recovery which has no rights as regards the wreckage site beyond those associated with the arrest of the light fixture.").

In the event this Court would ultimately agree with Petitioner's submission that an incorrect standard of abandonment was applied below, the matter of Yukon's salvor-in-possession status would be left for reconsideration by the District Court on remand.

acquired subrogation title to particular cargo on board The ISLANDER shipped by the Canadian Bank of Commerce ("CBC"), and (b) did not subsequently abandon that title through its own inaction in the face of later salvage efforts.

As a matter of law, MIC could not have acquired a subrogation interest in gold on board The ISLANDER because it could not conclusively show *both* that (1) it had insured CBC's gold, *and* (2) that it had fully paid CBC for the loss. In the absence of documentary evidence of an insurance contract between CBC and MIC, and evidence of a claim fully paid, the District Court was legally obliged to have Ocean Mar otherwise prove, by clear and convincing evidence, MIC's claim. Instead, the Court of Appeals permitted Ocean Mar to prove its case with weak and circumstantial evidence, and only to a preponderance of the evidence standard.[3]

Moreover, the Ninth Circuit ruled (as a matter of law) that MIC had not later abandoned title to the cargo on board The ISLANDER by failing to object when an independent

[3] The Ninth Circuit opinion suggests that Yukon only raised on appeal the argument that MIC's subrogation right must be proven by clear and convincing evidence. App. 5a. In a Supplemental Trial Brief, filed in the District Court on July 10, 1998 (less than 6 weeks prior to the District Court's Judgment and Opinion, see App. 15a), Yukon clearly raised the contention that to the extent Ocean Mar was relying on a lost insurance policy or claims payments, such would have to be made "by clear and convincing, or strong and conclusive evidence." Dist. Ct. Docket No. 185, at 5. While Yukon submits that this issue has not been waived in earlier proceedings, it would be content to rest its Petition exclusively on the Ninth Circuit's holding (discussed next) that MIC's failure to object to salvage efforts on The ISLANDER did not effectuate an abandonment of the cargo.

salvor recovered much of the wreck in 1934. The Court of Appeals noted that although salvage efforts had been at least partially successful in recovering gold from the wreck, App. 6a-7a, that was not legally significant as to the gold cargo that remained on Alaska's submerged lands. Only if the 1934 salvage efforts had succeeded in raising the disputed cargo, the Ninth Circuit held, would that have acted as a dispositive renunciation of MIC's title. See App. 7a-8a.

The overall effect of the Ninth Circuit's ruling is to make it exceedingly easy for marine insurers to claim title (via subrogation) to lost hulls and cargoes, even in the absence of documentary proof of an insurance policy or claims made and satisfied. Once an insurer acquires title under this generous standard, the Ninth Circuit's approach is tantamount to requiring an express abandonment by the original owner or insurer of its rights in the lost property. Not even the failure to respond to subsequent salvage efforts undertaken by another party will be deemed to constitute evidence of abandonment. If left unreviewed, the standard of abandonment enunciated by the Ninth Circuit — as well as the evidentiary burdens assigned by that court in historic shipwreck cases — will inevitably result in *no* vessel or cargo being deemed abandoned, and one of Congress' essential purposes of the ASA (that States should manage abandoned shipwrecks) will be subverted.

REASONS FOR GRANTING THE PETITION

This Petition calls upon the Court to once again exercise its authority as the ultimate guardian of the integrity

and coherence of the nation's admiralty law. See *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959) ("The issue is one of importance in the development of the law maritime, as to which we have large responsibilities, constitutionally conferred. . . ."). At stake here is the proper construction of the standard of abandonment in the Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298 (Apr. 28, 1988), codified at 43 U.S.C. §§ 2101-06 (hereinafter the "Act" or "ASA"); App. 31a, and the legal disposition of — by Congress' own estimation — nearly 50,000 abandoned shipwrecks littering the navigable waters of the United States and situated on State submerged lands. See *Abandoned Shipwreck Act of 1987*, H.R. Rep. Nos. 100-514(I) & 100-514(II), 1988 U.S.C.C.A.N. at 365, 370. Review is necessitated of the Ninth Circuit's decision because it opens an already-wide split in the Courts of Appeals' divergent interpretations of the ASA, as well as subverting Congress' legislative purpose for the Act.

1. *The circuits are divided on the Abandoned Shipwreck Act's standard of abandonment and the burdens of proof to be assigned for such a standard.* In recent years, the Courts of Appeals have sharply disagreed among themselves as to when property lost at sea becomes abandoned, with the result of substantial confusion in maritime law. The division can be roughly characterized as points along a doctrinal continuum from express abandonment to implied abandonment to presumed abandonment.

This split has been noticed by the Courts of Appeals themselves,[4] and some have gone so far as to call for this Court's resolution of the matter:

> we agree that the [Fourth Circuit's] abandonment test was rejected by two other courts of appeal, the Ninth Circuit in *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379, 387-88 (9th Cir. 1996), aff'd in part, vacated in part on other grounds, and remanded, 118 S.Ct. 1464, 1473 (1998) and the Sixth Circuit in *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem*, 105 F.3d 1078 (6th Cir. 1997), vacated and remanded on other grounds, 118 S. Ct. 1558 (1998)....A comparison of our earlier decision in this case in 974 F.2d 450 with the decision of the Supreme Court and the Ninth Circuit in *Brother Jonathan* and the Sixth Circuit in *Fairport* indicates that the rule for finding abandonment is more stringent in this circuit than in the Sixth Circuit and may be the same as the Ninth Circuit's rule in *Brother Jonathan*. In any event, the rule in

[4] These schisms have also been observed by commentators. See, e.g. John Paul Jones, *The United States Supreme Court and Treasure Salvage: Issues Remaining After* Brother Jonathan, 30 J. MAR. L. & COM. 205 (1999); D. David Lorello, Jr., Comment, *The Abandoned Shipwreck Act of 1987: Navigating through the Fog*, 35 GONZ. L. REV. 75 (1999/2000); Thompson M. Mayes, *Protection of Historic Shipwrecks - Outline of Legal Issues*, SD02 ALI-ABA 795 (1998); Sabrina L. McGlaughlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 COLUM.-VLA J. L. & ARTS 149 (1995).

> the three circuits is not the same and the Supreme Court has not clarified the question . . . .

Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 203 F.3d 291, 304-04 (4th Cir. 2000). See also *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1084 (6th Cir. 1997); *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379, 387-88 (9th Cir. 1996).

One Court of Appeals (the Fourth Circuit) has required evidence of express abandonment — an affirmative renunciation by an owner of property lost at sea — before property will be deemed abandoned under the ASA. See *Sea Hunt, Inc. v. Unidentified Vessel or Vessels*, 47 F. Supp.2d 678, 685-88 (E.D. Va. 1999) (relying upon *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993)).

At the other extreme, the First, Fifth and Eleventh Circuits appear to allow the inference of abandonment based merely on the passage of time, and so implicate a presumption of abandonment. *See, e.g., Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1064-65 (1st Cir. 1987); *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978).

Occupying a middle position on the spectrum, but in further tension with other courts, the Sixth and Ninth Circuits

appear to each allow the inference of abandonment based on the totality of circumstances (an implied abandonment test), but are themselves in conflict regarding whether proof of abandonment requires "clear and convincing evidence" or, instead, simply a "preponderance." Compare *Deep Sea Research, Inc. v. The Brother Jonathan,* 102 F.3d 379, 387-88 (9th Cir. 1996); with *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence,* 177 F.3d 491, 501 (6th Cir. 1999).

The absence of technology to effectuate a recovery of property lost at sea, as well as the legal significance of prior salvage efforts, appears also to be questioned in some circuits. It is not clear whether the absence of technology is a *per se* bar to a finding of abandonment, or instead one factor to be weighed with the totality of other evidence. See *Deep Sea Research, Inc. v. The Brother Jonathan,* 102 F.3d 379, 387-88 (9th Cir. 1996). Additionally, some circuits have relaxed the evidentiary burden of marine insurers in proving subrogation rights for long-lost insurance policies and claims. See *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 56 F.3d 556, 576 (4th Cir. 1995) Thus, the division among the circuits goes beyond the strict definition of abandonment, and also extends to evidentiary presumptions and burdens of proof.

2. *The Ninth Circuit's decision underscores the conflict as to the ASA's proper standard of abandonment and subverts the ASA's intent to vest ownership of historic shipwrecks in the States.* The Ninth Circuit's decision in *Yukon Recovery* propounds a too-restrictive test of abandonment. The Ninth Circuit's *Yukon* decision permits marine underwriters to make claims to sunken hulls and cargoes they allegedly had long ago insured, even when (1) there is a lack of documentary proof of

the insurer having underwritten a risk or paid claims, and (2) even more importantly, where actual salvage had been undertaken on the wreck after it sunk, without the consent of the original owner or insurer.

The 1987 Abandoned Shipwreck Act, 43 U.S.C. § 2101 *et seq.*, establishes the basic parameters of State ownership of historic shipwrecks located in State waters. The fundamental purpose of the Act was to promote State management of historic shipwrecks and to encourage rational multiple-use of these resources. See id. §§ 2101(a), 2103, 2104(a); App. 31a-34a; see also *Abandoned Shipwreck Act of 1987*, H.R. Rep. No. 100-514(I), at 1-2; H.R. Rep. No. 100-514(II), at 5-6; reprinted in 1988 U.S.C.C.A.N. at 365, 365-66, 374-75. The Act grants to the States title to shipwrecks that are (1) abandoned *and* (2) either embedded in the submerged lands of the State *or* listed (or eligible for listing) on the National Registry of Historic Places. See id. § 2105(a); App. 34a-35a. While the ASA does not define the term "abandonment," Congress did indicate in its findings that it was concerned with sunken vessels "which have been deserted and to which the owner has relinquished ownership rights with no retention." Id. § 2101(b); App. 31a.

In this matter, Yukon has proceeded under the assumption that The ISLANDER was abandoned and that any recovery of its cargo would have to be sanctioned by the State of Alaska, as the owner of the wreck. To this end, Yukon secured the necessary permits from Alaska authorities. And while Ocean Mar procured the same permissions, its strategy later changed to a posture of asserting that the gold cargo was *not* abandoned. Ocean Mar seemingly preferred to negotiate with a pretended owner of the cargo, one that would have fewer

archaeological and environmental scruples than the State of Alaska's officials.

If the decision of the Ninth Circuit goes unreviewed here, one of the essential bases of State management of historic shipwrecks under the ASA will be seriously undermined: virtually any ship or cargo that was allegedly insured will be found to have an owner and thus not be abandoned. Potential salvors who wish to avoid State shipwreck regulation would need only procure the services of a cooperative marine insurer which, on the flimsiest of documentary evidence, would assert subrogation rights. And while Yukon is most certainly not arguing that abandonment should be lightly inferred, the Ninth Circuit's evidentiary standard radically shifts the balance in favor of a party that would seek to defeat State regulatory authority by allowing a claim of continued ownership with virtually no evidence.

Likewise, the Ninth Circuit's decision will offer incentives to marine insurers to engage in conduct that would seriously undermine established marine insurance law. In being generously forgiving of Marine Insurance Company's (MIC's) document retention policies, marine insurers may actually be encouraged to selectively destroy their business records. A marine insurer studying the decisions below might actually see advantage in retaining evidence of a general cover, or open form, policy, for a wide group of shippers, but destroy specific records of endorsements, certificates, or slips for specific shipments or cargoes. In that way, they might plausibly assert later that, since they were known to have insured a particular shipper's cargoes, they might be assumed to have insured a specific valuable cargo that can now be recovered. Likewise, the decision below will encourage marine insurers to more

readily discard records of premiums collected, claims paid or disputed, and express abandonments of insured cargoes. This behavior will result in a fundamental informational imbalance for a party seeking to demonstrate that a marine insurer never underwrote a particular cargo, or did not succeed via subrogation to the rights of the shipper (by paying claims).

To the extent that courts rely on negative inferences to determine ownership in historic shipwreck cases, any doctrinal incentive for an insurer to distort the documentary record of policies written, claims made, and titles abandoned, must be rejected. Ocean Mar has seemingly persuaded the Ninth Circuit that they can take more by proving less. And by crafting a new evidentiary standard of assessing insurer's claims in historic shipwreck cases, the Court of Appeals has profoundly unsettled Congress' intent in the ASA and disturbed established principles and customs of marine insurance.

By also ignoring previous salvage attempts, see App. 6a-8a, the Ninth Circuit seems also to endorse a rule that a marine insurer is never deemed to abandon a hull or cargo. The essence of the Ninth Circuit's decision in this regard is that unless a previous salvage attempt actually recovered material under a claim of ownership by a party, no inference of abandonment would be charged to that original owner. This results in an *ipse dixit* — property lost at sea is not abandoned by an original owner unless it is actually recovered by another party. In this respect, the Ninth Circuit's *Yukon* ruling essentially places it in alignment with the Fourth Circuit's express abandonment standard, articulated in *Columbus-America Discovery Group*, 974 F.2d 450 (4th Cir. 1992), and applied to wrecks covered by the ASA in *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp.2d 678 (E.D. Va. 1999).

Lastly, the Ninth Circuit's decision in *Yukon Recovery* appears to be in manifest tension with that of other circuits. Putting aside the question of whether the *Yukon* panel applied an express or implied standard of abandonment, that Court's handling of such issues as proof of marine insurance, and the legal significance of limitation proceedings and prior salvage attempts, creates a strong (if not irrebuttable) presumption of non-abandonment. This result has been criticized by other circuits. As the Sixth Circuit noted, "[c]ommon sense makes readily apparent that the [ASA] did not contemplate a court's requiring express abandonment; such explicit action is obviously rare indeed . . . ." *Fairport Int'l Exploration, Inc. v. The CAPTAIN LAWRENCE*, 105 F.3d 1078, 1085 (6th Cir. 1997), vacated on other grounds, 523 U.S. 1091 (1998).

Yukon Recovery, as Petitioner, would seek the Supreme Court's review in order to clarify the general maritime law's relevant standard of abandonment for shipwrecks otherwise subject to the terms of the ASA. At a minimum, this would mean that no evidentiary burden should be imposed against a State (or allied party) in showing abandonment. Moreover, the Court will be invited to consider whether special evidentiary rules need to be in place for proof (by a marine insurer) of a subrogation interest in a wreck. Lastly, the Court will need to consider whether the previous availability of technology or the means of recovery of a wreck site affects the determination of abandonment.

This Petition offers a chance to the Court to revisit the issue left open in *California v. Deep Sea Research, Inc.* — the precise contours of the ASA's standard of abandonment. This Court may well have believed that its reminder to apply the general maritime law of abandonment, 523 U.S. at 508, would

resolve any potential conflict among lower courts making such determinations. Alas, that hope has not been realized. Although Petitioner is mindful that a scant two years has followed this Court's decision in *Deep Sea Research*, the trend is for a further widening of circuit authority on this subject. Of the decisions issued since this Court's ruling,[5] each has reported a growing split, and no apparent move towards harmonization can reasonably be expected.

And while Petitioner understands that the very judicial nature of abandonment determinations is fact-intensive, the issue presented in many of these recent cases is truly one of legal standards and burdens of proof. Whatever rule this Court adopts, it will be applied by admiralty courts, the rulings of which will only be subject to review for clear error. It is especially incumbent in such situations that there be a coherent, national and uniform legal standard of abandonment for property lost at sea. This submission has particular force where the general maritime law intersects with an Act of Congress — such as the ASA — that evinces a significant policy preference for the management of underwater cultural heritage.

At stake in this Petition is the proper application of the general maritime law's standard of abandonment for property lost at sea, the enforcement of equitable rules for marine

[5] In addition to the Ninth Circuit's ruling in *Yukon*, see *Fairport International Exploration, Inc v. The Captain Lawrence*, 177 F.3d 491 (6th Cir. 1999), on remand, 72 F. Supp.2d 795 (W.D. Mich. 1999); *Sea Hunt, Inc. v. Unidentified Vessel or Vessels*, 47 F. Supp.2d 678 (E.D. Va. 1999); *The People ex rel. Illinois Historic Preservation Agency v. Zych*, 710 N.E.2d 820 (Ill. 1999); *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 203 F.3d 291 (4th Cir. 2000).

insurers claiming subrogation rights in such property, and the effectuation of Congress' manifest intent in the Abandoned Shipwreck Act. Regrettably, the Ninth Circuit's ruling challenges each of these three objectives. Petitioner trusts that in its wise exercise of discretion to preserve the uniformity and harmony of the national maritime law, this Court will grant review here.

CONCLUSION

For the foregoing reasons, this Petition ought to be GRANTED.

Respectfully submitted,

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June 1, 2000

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